HIGH COURT OF UTTARAKHAND AT NAINITAL
(Court's Order whether the case is or not approved for reporting)

Description of the case

S. A. 1360 of 2001

Smt. Rateshwari Devi

Vs.

Smt. Mithilesh Bansal

Approved for reporting

Date of Decision: 14.12.2007

Initial of Judge:

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HIGH COURT OF UTTARAKHAND AT NAINITAL

SECOND APPEAL NO. 1360 OF 2001

1. Smt. Rateshwari Devi (deceased)
   W/o Late Shri Surya Mani Lakhera
   Resident of 25, Saraswati Soni Marg
   Dehradun.

1/1 P.L. Lakhera
   S/o Late Shri S.M. Lakhera
   Resident of 25, Saraswati Soni Marg
   Dehradun

1/2 Smt. Shakuntala Badola
   W/o Shri H.M. Badola
   Resident of 25, Keshav Road
   Dehradun

1/3 Smt. Manorama Bhatt
   W/o Shri P.K. Bhatt
   Resident of Arya Nagar
   Dehradun

¼ Smt. Kamla Bhatt
   W/o Shri C.M. Bhatt
   R/o M.D.D.A. Colony, Dalanwala
   Dehradun

.....Defendants Appellant

Vs.

Smt. Mithalesh Bansal
W/o Shri Darshan Lal Bansal
R/o 24, Saraswati Soni Marg
Dehradun

..... Plaintiff-Respondent

14.12.2007

Hon'ble Rajesh Tandon, J.

Heard Shri Rajendra Dobhal, counsel for the appellants and Shri N.S. Negi, counsel for the respondent.

2. By the present second appeal filed under Section 100 of the Code of Civil Procedure, the appellants have prayed for setting aside the judgment and decree dated 18.04.2001 passed by the Civil Judge (J.D.), Dehradun in O.S. No. 172 of 1999 as well as the judgment and order dated 27.08.2001 and the decree dated 3.9.2001 passed by the Civil Judge (S.D.) in civil appeal no.64 of 2001.

3. Second appeal was admitted on the following substantial question of law:-

> "Whether the courts below justified in holding that the plaintiff/respondent is the owner of land in dispute without any evidence on record with regard to the ownership of the land in dispute.?

4. Briefly stated, the plaintiff Smt. Mithilesh Bansal has filed a suit being suit no. 172 of 1999 praying for declaratory injunction against the defendant Smt. Rateshwari Devi. According to the paint averments, the plaintiff is the owner of the house no. 24 situate at Saraswati Soni Marg, Dehradun and the defendant Smt. Rateshawari Devi is the neighbor of the plaintiff. The house of the plaintiff is 43 ft.

in length and 28ft. in width and the house of Rateshwari Devi is 91 ft. in length and 32 ft. in width. It has been alleged that the defendant Reteshwari Devi has built a door with the intention to grab the land of the plaintiff to the extent of 28 ft. 21 inch on which the water drain of the plaintiff is made. The defendants have never used this drainage. It has been alleged that the defendants have constructed a pillar on the said land which is illegal and deserves to be removed. The plaintiff has requested several times to the defendants to remove the same and sent a notice but the defendants did not remove the same. Hence, the present suit has been filed.

5. The defendant Rateshwari Devi has filed a written statement submitting therein that the she has not built any gate on the said land and she never intended to grab the land of the plaintiff. The drainage in question never remained the property of the plaintiff. The defendant is in possession over the property which is short by 32.ft land purchased by her. It has been submitted that the plaintiff has no cause of action to institute the suit. The suit of the plaintiff is liable to be dismissed.

6. The plaintiff has filed a replication and has denied the submission made by the defendant. The plaintiff has also reiterated the plaint averments in her replication.

7. On the basis of the pleadings, the trial court has framed the following issues:-

1. As to whether the plaintiff is owner of the disputed property?
2. As to whether the defendant has encroached the land of the plaintiff to the extent of 21 inch x 28 ft. by erecting pillar? If yes, its effect?
3. As to whether the suit is less valued?
4. As to whether the court fee paid is inadequate?
5. Relief?

8. The plaintiff has produced paper ka i.e. map, copy of notice i.e. paper no. 8 Ka, registry receipt i.e. paper no.9 ka, reply of notice i.e. paper no. 10 ka, four photographs as per list 17 ga, certified copy of sale deed i.e. paper nos. 34 ga to 35 ga. In he oral evidence, the plaintiff has examined herself as P.W.1 and Darshan Lal as P.W.2.

9. The defendants have produced D.W.1 Panna Lal Lakhera in the oral evidence.

10. While deciding as to whether the plaintiff the owner of the disputed property, the trial court has placed reliance on the deposition of P.W. i.e. the plaintiff herself and paragraph no. 1 of the written statement wherein the defendant has admitted the ownership of the plaintiff. The trial court has also relied upon paper no. 39 ga which is Commissioner Report and the same has not been challenged by either of the parties. In the report of the Amin, the land of plaintiff has been shown as 42 x 10

which should have been 43 feet. On the basis of the aforesaid, the trial court has recorded the finding that the plaintiff is the owner of the property in dispute and the drainage in question is the part of the plaintiff's property.

11. While deciding as to whether the defendant has encroached the land of the plaintiff to the extent of 21 inch x 28 ft. by erecting pillar, the trial court has recorded the finding that the defendant has encroached the 2 inch x 28 feet land by erecting pillar on the land of the plaintiff. The trial court has recoded the finding to the following effect:-

> "वादिनी की ओर से जो फोटोग्राफ दाखिल किये गये है, उनको विधिवत साबित नहीं किया गया है और उन फोटो की मदद से यह साबित नहीं होता है कि वादिनी की नाली 21 इंच X 28 फीट हो और फोटो उक्त की मदद से निष्कर्ष नहीं दिया जा सकता, परन्तु अमीन कमिश्नर रिपोर्ट कागज नं0 39 ग, जिसको आपत्ति न होने के कारण पुष्ट किया जा चुका है, केवल 2 इंच चौड़े भाग पर नाली बतायी गयी है और अतिक्रमण भी प्रतिवादिनी का 2 इंच चौड़े व 28 फीट लम्बे भाग पर बताया गया है। अतः केवल 2 इंच X 28 फीट भूमि पर पिलर के सम्बन्ध में प्रतिवादिनी का अतिक्रमण विदिनी की भूमि पर अमीन कमिश्नर की रिपोर्ट पुष्ट होने के आधार पर साबित होता है, ना कि वादिनी की भूमि 21 इंच X 28 फीट पर । उक्त विवेचना के आधार पर वाद बिन्दु नं0 2 21 इंच X 28 फीट के स्थान पर प्रतिवादिनी की भूमि पर, जो कि वादिनी की नाली है, पिलर खड़ा करके 2 इंच पिलर के रूप में अतिक्रमण किया है ।"

12. On the basis of the aforesaid, the trial court has decreed the suit of the plaintiff to the extent of removal of pillar up to 2 inch.

13. Aggrieved by the judgment and decree passed by the trial court, the defendant went in appeal.

14. The appellate court has placed reliance on the sale deed i.e. paper no. 34 wherein the alleged 28 feet drain has been shown in the house of the plaintiff-respondent. The appellate court has come to the conclusion that the drain in question belongs to the plaintiff and the defendant has encroached over the drain by erecting pillar on 2 inch x 28 feet land. The findings recorded by the appellate court are quoted below:-

> "प्रत्यर्थी/वादिनी की आरे से अपने मकान का विक्रय पत्र दाखिल किया गया है जिसमें 34 व के परिप्रीलन से यह स्पष्ट हो जाता है कि वादिनी/प्रत्यार्थी के मकान में कथित नाली 28 फीट लम्बी होनी नक्प्रा संलग्न विक्रय–पत्र में दिखायी गयी है और वादिनी के मकान के सनप्रेड मकान के पश्चिम में स्थित नाली की साइड में दिखाये गये हैं । अमीन रिपोर्ट के साथ वादिनी के मकान का नक्प्रा भी यह स्पष्ट करता है कि कथित नाली वादिनी के मकान में सम्मिलित है । अपीलार्थी /प्रतिवादिनी की ओर से अपने मकान का कोई नक्प्रा दाखिल नहीं किया है, न ही बतौर साक्षी प्रतिवादिनी को पेप्र किया गया है । यदि वास्वत में कथित नाली प्रतिवादिनी की सम्पत्ति का भाग थी तो प्रतिवादिनी न्यायालय में अपने मकान के विक्रय–पत्र के

साथ संलग्न मानचित्र दाखिल करके यह साबित कर सकती थी कि कथित नाली प्रतिवादिनी/अपीलार्थी के मकान में सम्मिलित है । इस प्रकार से वादिनी के मकान में स्थित 2 इंच x 28 फीट नाली के मकान में सम्मिलित है ।"ध

15. On the basis of the aforesaid, the appellate court has dismissed the appeal.

16. Both the courts below have given the concurrent findings of fact. The substantial question of law involved in the present second appeal, therefore, is decided against the appellant.

17. In **Riazuddin v. Abdur Rashid 1980 A.L.J. 148, it** has been observed as under:-

"5. Even assuming that it is necessary for the plaintiff to prove special damage in order to maintain the suit for an injunction to remove an obstruction from the public pathway, it is necessary for him to prove some damage, specially to himself."

6. .....But a person owning property on the road-side which he must pass and repass in order to get to his property or which is one of the usual ways thought which he gets to his property does suffer damages by the narrowing down of that road by an obstruction placed at some place from where he often pass to and from his property."

18. In view of the above, it will be open to the parties to claim the damages during the execution proceedings which shall be decided by the executing court in accordance with law.

19. IN ***H.P. Pyarejan Vs. Dasappa 2006 AIR SCW 715,*** the apex Court has observed as under:-

> "Under Section 100 of the Code (as amended in 1976) the jurisdiction of the High Court to interfere with the judgments of the courts below is confined to hearing on substantial questions of law. Interference with findings of fact by the High Court is not warrant if it involves re-appreciation of evidence."

20. In the **Commissioner Hindu Religious & Charitable Endowments v.P. Shanmugama and others (2005) 9 SCC 232,** it has been held under:-

> "14. In our view, High Court has no jurisdiction in the second appeal t interfere with the finding of facts recorded by the first appellate court after careful consideration of the evidence, oral and documentary, on record. It was not open to the High Court to reverse the findings of fact as it has done."

21. In view of the aforesaid, second appeal is liable to be dismissed being devoid of merit.

22. Subject to the observations made above, second appeal is dismissed. No order as to costs.

(Rajesh Tandon, J.)

14.12.2007
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